



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Decision in Railroad Noise Regulation Case

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As you know, the U.S. Court of Appeals for the Third Circuit recently decided Baltimore and Ohio Railroad Co. v. Oberly (Oberly), No. 85-5272. While EPA was not a party to the case, at issue was whether the Noise Control Act of 1972 and EPA regulations issued thereunder preempt application of Delaware's noise control statute to trailers on flatcars (TOFCs) at B&O's Wilsmere, Delaware railyard. The Third Circuit found that EPA's regulations do not "facially preempt" Delaware's statute as potentially applied to the Wilsmere TOFCs. The decision is significant for EPA because the U.S. Court of Appeals for the D.C. Circuit has separately ruled that EPA is statutorily obligated to regulate all sources of railroad noise, so as to preempt such regulation by the states.

BACKGROUND

The case was originally brought in district court by B&O Railroad to restrain Delaware from enforcing the state's noise statute against the railroad's facility in Wilsmere, Delaware. B&O argued, among other things, that Delaware's noise statute as applied to railroads is preempted by federal law.

The district court granted B&O's request for a preliminary injunction. The court noted that EPA had expressly considered, and rejected as "unnecessary," regulations of those sources of railroad noise that Delaware sought to control. The court also noted that EPA's regulatory decision was made in response

to an order entered by the D.C. Circuit in American Association of Railroads v. Costle (AAR), 562 F.2d 1310 (D.C.Cir. 1977). The AAR court had found that Congress intended EPA to preempt the field of railroad noise regulation, and consequently had ordered EPA to regulate all railroad "equipment and facilities," as those terms are understood by the railroad industry. In light of the order, the district court found that EPA's decision not to further regulate certain sources of railroad noise preempted state regulation of the same.

Delaware appealed the district court's decision, whereupon the Third Circuit requested EPA's opinion on the preemption issue. The Department of Justice, on behalf of EPA, submitted a memorandum of law that agreed with the district court's findings. The Third Circuit ultimately upheld the district court in a short opinion that explicitly noted EPA's agreement with the courts' conclusion that Delaware was preempted from enforcing its statute against the Wilsmere railyard.

Delaware then appealed the Third Circuit's judgment to the Supreme Court, which invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General's brief disavowed the position taken in the memorandum submitted to the Third Circuit, explaining that the memorandum had been mistakenly filed "because of a failure of communication within the Department of Justice." The Solicitor General instead argued that Delaware is not preempted from applying its statute to the Wilsmere facility. Since the United States had changed its position, the Supreme Court vacated the Third Circuit judgment and remanded the case "for further consideration in light of the position presently asserted by the Solicitor General[.]"

THIRD CIRCUIT DECISION

On remand, the Third Circuit reversed its original decision and found that Delaware's noise statute and regulations are not "facially preempted" by federal law. In reaching that conclusion, the court agreed with two arguments made by the United States in its amicus brief. First, the court held that the preemption provision of the Noise Control Act only forbids states and localities from regulating those sources of railroad noise that federal regulations specifically address. The court acknowledged that AAR requires EPA to regulate all railroad equipment and facilities, and that EPA's performance of that duty would effectively displace all such regulation by the states. Nonetheless, the court concluded that until EPA has completed its regulatory task, states and localities are free to regulate those sources of railroad noise EPA has not.

Second, the court found that EPA's decision not to regulate the sources of railroad noise Delaware sought to control was not "an authoritative federal determination that the area is best left unregulated," which has "as much pre-emptive force as a decision to regulate." Slip Op. at 17, quoting Arkansas Elec. Coop. Corp. v. Arkansas Public Comm'n, 461 U.S. 375, 384 (1983). The court held that for an agency decision not to regulate to have preemptive effect, the agency must "declare, at a high level of specificity, its intention that its inaction preempt state law," because "this 'passive' context offers little else from which one can infer anything of an agency's intention." Opin. at 17.

The court found no such specific statement by EPA that its decision not to regulate certain sources of railroad noise was meant to preempt states and localities from regulating the same. Indeed, the court agreed with the United States that the decision not to regulate should be given "even less preemptive effect than would normally be the case," in light of the "peculiar litigation situation" in which it was made. Id. at 18. Since the AAR order was entered in response to EPA's initial reluctance to regulate some of these same sources, the court considered EPA's subsequent decision against regulating these sources "not a 'typical' agency decision not to regulate." Id. The court instead understood the agency's decision as "the absence of a real regulatory decision[.]" Id. (original emphasis). Since "[t]his field ... still awaits definitive federal action, either on the side of regulation or on the side of no regulation at all[.]" the court concluded that Delaware's regulatory scheme has not been "facially preempted." Id.

The court carefully limited its ruling to the question of whether the federal scheme preempts Delaware's noise control provisions on their face. That is, it found only that Delaware had identified a possible application of its noise regulations, specifically its property-line standard to trailers on flat cars (TOFCs) at the Wilsmere railyard, that does not appear to conflict with federal law. However, it left open the question of whether, as applied, Delaware's noise regulations would make it impossible for the railroad to comply with both federal and state regulations, or "erect an obstacle to the achievement of the federal purposes underlying the Noise Control Act." Id. at 20.

The Third Circuit vacated the district court's order preliminarily enjoining enforcement of Delaware's noise control provisions against the Wilsmere facility, and remanded the case to the district court for further proceedings. Issues still before district court are 1) whether enforcement of Delaware's noise statute would impermissibly burden the

railroad's operations in interstate commerce in violation of the Commerce Clause; and 2) whether both the Delaware statute and its regulations are void for vagueness under the Fourteenth Amendment.

A copy of the Third Circuit opinion is attached.

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